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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 430 and No. 834
(Consolidated)

SAM ACHILLI, *Petitioner*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF PONCET DAVIS AS AMICUS CURIAE

PEYTON FORD
ALAN Y. COLE
Attorneys for Amicus Curiae

Of Counsel:
FORD AND LARSON
Washington, D. C.

JAMES C. HERNDON
Akron, Ohio

EDMUND D. DOYLE
Columbus, Ohio

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BRIEF OF PONCET DAVIS AS AMICUS CURIAE

With the consent of the parties, Poncet Davis files this brief as Amicus Curiae. The original copies of the consents have been filed with the Clerk of this Court.

INTEREST OF AMICUS CURIAE

Amicus Curiae, Poncet Davis, has an interest in this proceeding in that he now has an appeal pending in the Court of Appeals for the Sixth Circuit, *Poncet Davis* v. *United States*, No. 13,042, in which the question involved is the same as that presented in the instant cases.

Amicus Curiae was tried and convicted in the United States District Court for the Northern District of Ohio of four counts of willfully attempting to defeat and evade payment of his income taxes by filing false and fraudulent income tax returns. He was sentenced to serve five years of imprisonment on each count, the sentences to run concurrently, and fined $10,000 on each count, making a total sentence of five years imprisonment and a total fine of $40,000. The conviction was affirmed on appeal, 226 F. 2d 331, and certiorari was denied, 350 U.S. 965. Thereafter, the District Court reduced Amicus' sentence from five to four years on each count, the sentences to run concurrently.

After commencement of service of sentence, Amicus Curiae filed a motion to correct his sentence in the District Court in which he had been tried, contending that the crimes for which he had been convicted were, under law, misdemeanors rather than felonies, and that the penalty prescribed for such misdemeanors was imprisonment for a period not exceeding one year and a fine not exceeding $1,000. The motion was overruled by the United States District Court for the Northern District of Ohio on September 27, 1956 (Appendix A, *infra*).

Amicus Curiae took an appeal from that decision to the United States Court of Appeals for the Sixth Circuit and filed his brief in that Court on December 17, 1956. Thereafter, this Court granted the petition for writ of certiorari in No. 666, *Costello v. United States*. Following this Court's grant of certiorari in the *Costello* case, the Government filed a motion in Amicus Curiae's case in the Sixth Circuit Court of Appeals, requesting that Court to extend the Government's time

for filing its brief and appendix until sixty days after the issuance of the opinion and decision by this Court in *Costello*. On February 12, 1957 the Court of Appeals for the Sixth Circuit entered an order granting the Government's motion (Appendix B, *infra*).

On March 4, 1957, this Court granted the petition for writ of certiorari in No. 430, *Achilli v. United States*, limiting the grant to the same question as that involved in No. 666. On March 25, 1957, certiorari was granted in No. 834, *Achilli v. United States*, and it was ordered consolidated with No. 430.

The question presented in the *Achilli* and *Costello* cases is identical to the question presented in the appeal of Amicus Curiae to the Sixth Circuit. Moreover, the Sixth Circuit has suspended the proceedings in Amicus' case pending determination of these cases by this Court. Since the decision in these cases, in consequence, will be dispositive of Amicus' appeal, Amicus has a substantial and direct interest in the outcome of these proceedings.

STATEMENT

Petitioner was convicted in the United States District Court for the Northern District of Illinois of three counts of willfully and knowingly attempting to defeat and evade the payment of his income taxes by filing and causing to be filed false and fraudulent income tax returns in violation of Section 145(b) of the Internal Revenue Code of 1939, 26 U. S. C. § 145(b). He was sentenced to two years of imprisonment on each count, the sentences to run concurrently, and a fine of $2,000 on each count, aggregating a total of two years imprisonment and $6,000 in fines.

On appeal, the Court of Appeals for the Seventh Circuit reversed the conviction on one count, but affirmed the judgment of conviction on the two remaining counts. 234 F. 2d 797. On November 19, 1956, this Court denied certiorari. 352 U. S. 916.

Petitioner then filed in the District Court in which he had been convicted a motion to correct or reduce sentence contending, *inter alia*, that the crimes of which he had been convicted were misdemeanors under Section 3616(a) of the Internal Revenue Code of 1939 rather than felonies under Section 145(b), with the consequence that the sentence imposed on Petitioner was incorrect and possibly invalid.

On December 27, 1956, the District Court expressly denied Petitioner's motion to correct sentence, holding "that there is insufficient basis here to warrant granting the motion to correct." At the same time, however, the District Court granted the motion to reduce the sentence, reducing Petitioner's sentence to one year on each count, the sentences to run concurrently, and the fines to $1,000 on each count, thereby imposing a total sentence of one year's imprisonment and $2,000 in fines on the two counts.

Appeal was taken from the District Court to the Seventh Circuit. On March 4, 1957, this Court vacated its prior order denying the petition for writ of certiorari, and granted the petition limiting the grant to the single question of "whether petitioner could be prosecuted and sentenced as for a violation of Section 145(b) of the Internal Revenue Code of 1939 where the facts also show a violation of Section 3616(a) of the Internal Revenue Code of 1939." U. S. . Thereafter, Petitioner filed a new petition for certiorari prior to

judgment by the Court of Appeals "for the purpose of bringing before the Court the entire record of the proceedings had subsequent to November 19, 1956." On March 25, 1957, this second petition was granted, and the cases were ordered consolidated. U. S.

SUMMARY OF ARGUMENT

The simple and dominant fact in this case, which the Government has conceded, is that the filing of a false or fraudulent return with intent to evade tax is, at one and the same time, a felony under Section 145(b) of the Internal Revenue Code of 1939 and a misdemeanor under Section 3616(a) of that Code, and the proof required to prove a violation of one provision is identical in all respects to the proof necessary to prove violation of the other. (See Memorandum of the U. S. in No. 666 at pp. 1-2).[1]

The overlap thus created, permits a prosecutor to discriminate between two persons convicted of doing the same unlawful act, and prosecute one for a felony and the other for a misdemeanor, though their conduct was identical and the proof against each precisely the same. Such power does not reside in the executive (or prosecuting) branch of the Government. It expressly violates a fundamental tenet of our system of criminal justice that all persons must be treated equally under law; and it usurps the prerogative of the Congress to

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[1] Before the United States District Court for the Northern District of Ohio, in *Amicus'* case, the Government stated in its Memorandum in Opposition: "The simple and dominant fact in this case is that Sections 145(b) and 3616(a) overlap, and in an area in which the facts of this case fall". The District Court adopted "the Government's brief in toto." (See Appendix A, *infra*.)

which the Constitution has reserved the function of declaring criminal penalties.

Two possible answers exist to the dilemma posed by the overlap of Sections 145(b) and 3616(a): *First*, that no conviction under either provision is valid, because the two, when taken together in the context of these proceedings, pose an inconsistency so great that it is a task outside the bounds of judicial interpretation, *United States* v. *Evans*, 333 U. S. 483. *Second*, that, if the two provisions may co-exist, then only the less harsh of the two provisions may be applied in this case, on the venerated principle that ambiguities in the enforcement of penal statutes should be resolved in favor of lenity, *Bell* v. *United States*, 349 U. S. 81.

ARGUMENT

I

Beginning with *Gavieres* v. *United States* (1911) 220 U. S. 338, and thereafter in an unbroken line of decisions, *e.g.*, *Morgan* v. *Devine* (1915) 237 U. S. 632; *Albrecht* v. *United States* (1927) 273 U. S. 1; *United States* v. *Noveck* (1927) 273 U. S. 202; *Blockburger* v. *United States* (1932) 284 U. S. 299; *United States* v. *Gilliland* (1941) 312 U. S. 86; *United States* v. *Beacon Brass Co.* (1952) 344 U. S. 43; *Rosenberg* v. *United States* (1953) 346 U. S. 273; *Pereira* v. *United States* (1954) 347 U. S. 1, this Court has laid down as the test for determining whether a single course of conduct can violate more than one criminal statute without transgressing the prohibitions against double jeopardy or double punishment: "that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is

whether each provision requires proof of an additional fact which the other does not." *Blockburger* v. *United States*, 284 U. S. at 304. Or, conversely, " . . . where different proof is required for each offense, a single act or transaction may violate more than one criminal statute." *United States* v. *Beacon Brass Co.*, 344 U. S. at 45.

In *Berra* v. *United States*, 351 U. S. 131, this Court declared:

> "the method of evasion charged was the filing of a false return, and it is apparent that the facts *necessary to prove that petitioner 'willfully' attempted to evade taxes by filing a false return (§ 145(b)) were identical with those required to prove that he delivered a false return with 'intent' to evade* taxes (§ 3616(a)). In this instance §§ 145(b) and 3616(a) covered *precisely* the same ground." 351 U. S. at 134. (Emphasis supplied.)

So, we begin with a definitive determination that—within the rubric of the double punishment cases cited *supra*—a defendant charged with filing a fraudulent income tax return could not be convicted under *both* Section 145(b) and Section 3616(a).

The *Berra* case and the instant case, in this respect, stand on all fours. Moreover, the Government has so conceded in its Memorandum in No. 666, *Costello* v. *United States*, at pp. 1-2:

> "Section 145(b) of the Internal Revenue Code of 1939 makes it a felony, punishable by imprisonment for not more than five years and by a fine of not more than $10,000, to attempt wilfully 'in any manner to evade or defeat' the income tax. In the overwhelming majority of cases prosecuted under Section 145(b), the 'manner' of attempted tax evasion alleged in the indictment is, as in this case, the filing of a false and fraudulent return. That such conduct violates Section 145(b) has been

uniformly and repeatedly recognized by this Court and the courts of appeals.

"The filing of a false and fraudulent return with intent to evade tax is also made a misdemeanor, punishable by imprisonment not exceeding one year and by fine not exceeding $1,000, by Section 3616(a) of the 1939 Code; and the latter section clearly applies to all federal tax returns, including income tax. In the instant case, as in *Berra* v. *United States*, 351 U. S. 131, and indeed almost every case prosecuted under Section 145(b), the proof that the defendant wilfully attempted to evade taxes by filing a false return is identical with that required to prove that he filed a false return with intent to evade tax, in violation of Section 3616(a). In this respect Sections 145(b) and 3616(a) overlap." (footnotes omitted.)

And the same concession has been made by the Government in other cases where the issue has been raised. So in its Memorandum in Opposition to Amicus' Motion in the District Court for the Northern District of Ohio, in *United States* v. *Poucet Davis*, Cr. No. 20632, the Government stated:

"The simple and dominant fact in this case is that Sections 145(b) and 3616(a) overlap, and in an area within which the facts of this case fall. Section 145(b) makes it a felony to attempt willfully 'in any manner' to 'evade or defeat' the income tax. * * *

"The filing of a false or fraudulent return with intent to evade tax is also made a misdemeanor by Section 3616(a), and the scope of the misdemeanor, as we have said, overlaps the scope of the felony in the area within which the facts of this case fall." (P. 2, Mem. in Opp.)

Accordingly, when the statement in *Berra* concerning the "precisely" similar nature of the offenses un-

der 145(b) and 3616(a), and the concessions of the Government in other cases are placed together with the teaching of the double punishment cases, it is manifest that only one offense was committed here.

And this is the dominant factor in this case: the same proof necessary to make out a violation of Section 145(b) in this case, *necessarily* also proves a violation of Section 3616(a) in this case; and vice versa. No different element of proof is necessary in either instance and the proof of one—without more—makes out proof of the other.

No better illustration of the extent of the overlap between Sections 145(b) and 3616(a) can be had than by examining the revision of Section 3616(a) made by the Congress at the time of the enactment of the 1954 Revenue Code.[2] Section 7207 of the Revenue Code of 1954, which replaced Section 3616(a) of the 1939 Code, no longer requires the element of "intent to defeat or evade", as was true under the prior Section 3616(a)[3]

[2] The argument in this Brief, at this point and hereafter, is predicated on the assumption that Section 3616(a) is applicable to income tax, which the Government has always heretofore conceded. Seen fn. 4, *infra*.

[3] Section 7207 of the Internal Revenue Code of 1954, which replaced Section 3616(a) of the 1939 Code, no longer requires the element of "intent to defeat or evade" as was true under Section 3616(a). It was this language in Section 3616(a) which made it cover precisely the same ground as Section 145(b).

The changes between former Section 3616(a) and present Section 7207 are graphically illustrated in the following ramseyred version:

~~Whenever~~ Any person who willfully delivers or discloses to the ~~collector or deputy~~ *Secretary or his delegate* any list, return, account, or statement, *or other document*, ~~with intent to defeat or evade the valuation, enumeration, or assessment intended to be made~~ *known by him to be fraudulent or to be false as to any material matter*, ~~he~~ shall be fined not ~~more than~~ *exceeding* $1,000, or be imprisoned not ~~exceeding~~ *more than* one year, or both, ~~at the discretion of the court, with costs of prosecution.~~

and, of course, it was this language in Section 3616(a) which made it cover precisely the same ground as Section 145(b). Thus, the "overlap" which existed between 3616(a) and 145(b) no longer exists between Section 7207 (formerly Section 3616(a)) and 7201 (formerly Section 145(b)) in the 1954 Code.

Undaunted by the fact that Sections 145(b) and 3616(a) cover "precisely the same ground" the Government has persistently contended in this and other similar proceedings, that it has the power to decide which of the applicable statutes, in any given situation, to invoke. It has relied, and presumably will rely in this Court, on such cases as *United States* v. *Beacon Brass Co.*, 344 U. S. 43; *United States* v. *Noveck*, 271 U. S. 202 and *Rosenberg* v. *United States*, 346 U. S. 273. But its efforts to bring the issue raised by these proceedings into the orbit of such cases is entirely inappropriate and therefore unavailing. For, in those cases, though the prescribed conduct violated more than one criminal statute, there was always the additional critical distinction that different proof was required to make out a violation of one or the other of the statutory provisions involved. Thus, in *Rosenberg*, *supra*, the relevant portion of the opinion reads as follows:

> "Where Congress by more than one statute proscribes a private course of conduct, the Government may choose to invoke either applicable law: '*At least where different proof is required for each offense*, a single act or transaction may violate more than one criminal statute.'" *Rosenberg* v. *United States*, 346 U. S. 273, 294 (Opinion of Clark, J.). (Emphasis supplied.)

The decision in *United States v. Noveck*, *supra*, is similarly limited:

> "The offenses defined in the two statutes are not identical. They are entirely distinct in point of law, even when they arise out of the same transaction or act. *Each involved an element not found in the other.*" 273 U. S. 202, 206. (Emphasis supplied.)

And likewise, in *United States v. Beacon Brass Co.*, *supra*, the Court noted:

> "We have before us two statutes, each of which proscribes conduct not covered by the other, but which overlap in a narrow area illustrated by the instant case. *At least where different proof is required* for each offense, a single act or transaction may violate more than one criminal statute." 344 U. S. at 45. (Emphasis supplied.)

These cases stand only for the proposition that where an act or course of conduct may violate more than one criminal statute, *and where different proof is required*, the Government may select the statute under which to prosecute. In each instance, the two statutes called for differing proof to make an offense, but this is not the proposition at issue in this case. *Here no difference in proof is required* in a prosecution under either 145(b) or 3616(a), and, as we have already noted, conviction under one provision necessarily would result in conviction under the other, for the elements of the offense in each instance are identical.

Furthermore, the cases so strongly relied upon by the Government, in general involved conduct proscribed by the provisions of two *different* statutes; that is, the same conduct was within the reach of two different statutory schemes. So in *Beacon Brass* the choice was between the False Statements provision, 18 U. S. C.

Section 1001, and 145(b) of the Revenue Code; in *Rosenberg*, between the Espionage Act and the Atomic Energy Act; in *Noreck*, between the general perjury statute and a provision of the revenue laws. See also, *United States* v. *Gilliland*, 312 U. S. 86; involving the general False Statements provision and a provision of the "Hot Oil" Act. The statutory provisions involved in this case, by contrast, reside in a single statutory scheme, are part of the same "code", and are necessarily directly related to each other. *Cf. Spies* v. *United States*, 317 U. S. 492.

II

There thus arises the situation of a defendant convicted of certain acts as to which two distinct and different penalties are applicable; but which, at the same time, are mutually exclusive. Which of the two apply? The Congress to which the Constitution has reserved the function of declaring criminal penalties, *United States* v. *Hudson and Goodwin*, 7 Cranch (U. S.) 32; *United States* v. *Britton, et al.*, 108 U. S. 199; *United States* v. *Eaton*, 144 U. S. 677; *Viereck* v. *United States*, 318 U. S. 236, 241, 243-4, and hence of providing a standard, has failed to provide any criterion for choosing between them.

At the outset, it is clear that no guidance can be obtained by referring to the indictment. This Court long ago declared: "It is wholly immaterial what statute was in the mind of the district attorney when he drew the indictment, if the charges made are embraced by some statute in force. * * * We must look to the indictment itself, * * * although the representative of the United States may have supposed that the offense charged was covered by a different statute." *Williams*

v. *United States*, 168 U. S. 382, 389. And this rule has been applied through the years. In *United States v. Hutcheson*, 312 U. S. 219, the Supreme Court said:

> "In order to determine whether an indictment charges an offense against the United States, *designation by the pleader of the statute under which he purported to lay the charge is immaterial.* He may have conceived the charge under one statute which would not sustain the indictment but it may nevertheless come within the terms of another statute * * *. On the other hand, an indictment may validly satisfy the statute under which the pleader proceeded, but other statutes not referred to by him may draw the sting of criminality from the allegations." 312 U. S. at 229. (Emphasis supplied.)

The mere "labelling" of the indictment in this case, as a proceeding under Section 145(b), cannot make Section 3616(a) any the less applicable. The indictment in the instant case comes as much within 3616(a) as it does within 145(b). As this Court noted in *Berra*: "In this instance 145(b) and 3616(a) covered precisely the same ground." 351 U. S. 134. And " * * * the allegations of an indictment are to be judged by the relevant statute under which punishment may be meted out and not by the design of the prosecutor or the assumption of the trial court * * *." *Rosenberg v. United States*, 346 U. S. at 306. (Opinion of Frankfurter, J.)

Also, at the outset, we believe that the problem posed by the overlap of Sections 145(b) and 3616(a) cannot be solved by resort either to their legislative history or to the canons of statutory construction. As this Court noted in a similar context, "It is not to be denied that argumentative skill * * * could persuasively and not

unreasonably reach any of the conflicting constructions." *Bell* v. *United States*, 349 U. S. 81, 83.

Arguments based upon the legislative history of these provisions, reaching as they do as far back as 1798, prove as much in one direction as they do in the other. And the canons of construction, as the District Court in *Amicus'* case recognized (See Appendix A *infra*), are themselves conflicting in this context.

Moreover, the Government itself seems to have become confused by the history it has so persistently invoked in this litigation. It has repeatedly conceded the applicability of Section 3616(a) to income tax cases.[4] Indeed, it has based income tax prosecutions on that provision.[5] Yet, in a Memorandum filed in this case (No. 834) on March 22, 1957, for the first time the Government has announced that it now believes—based upon its "genesis and history"—that Section 3616(a) is *inapplicable* to income tax violations.

In view of the short period of time this sudden and belated shift of position permits for answer, and in

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[4] See, *eg.*, Brief for the United States in *Berra* v. *United States*, No. 60, O. T. 1955 at pp. 7, 10-13, and especially fn. 9 at pp. 23-4. In the *Berra* decision, this Court expressly relied upon the Government's concession that 3616(a) applied to income tax violations. 351 U. S. at 133.

See also p. 2, Memorandum for the United States in *Costello* v. *United States*, No. 666, O. T. 1956.

[5] See Mem. for the U. S. in No. 834, p. 2; *cf. Ex parte Cohen*, 191 F. 2d 300 (C. A. 9) cert. den. 342 U. S. 947; *Taylor* v. *United States*, 179 F. 2d 640, 643-644 (C. A. 9); *Kirsch* v. *United States*, 174 F. 2d 595, 597-598 (C. A. 8); *Slick* v. *United States*, 1 F. 2d 897 (C. A. 7); *Ex parte Berkoff*, 65 F. Supp. 976, 979-981 (D. Minn.); *United States* v. *Koppelman*, 61 F. Supp. 1097, 1008-1009 (M. D. Pa.).

view, further, of the possibility that the Government may find still different meaning in the legislative history of the provisions before it files its Brief on the Merits, we now make no effort to controvert this latest view. If answer is necessary, it can be made in a Reply Brief. We call it to the Court's attention at this time, however, for the purpose of pointing up the chameleon-like character of the materials upon which the Government relies.

III

There are two possible answers to the dilemma posed by the overlap of Sections 145(b) and 3616(a): *first*, that no conviction under either provision is valid, because the two, when taken together in the context of this case, pose an inconsistency so great that it is a task outside the bounds of judicial interpretation; and *second*, that if the two provisions may co-exist, then only the less harsh of the two may be applied in this case.

It has been long settled that a criminal statute can be void for vagueness as much where the punishment to be inflicted is uncertain or open to speculation as where the acts prohibited are ambiguously or poorly defined. See *Holmes* v. *United States*, 267 F. 529, 531 (CA 5, 1920) cert. den. 254 U. S. 640; *Smith* v. *United States*, 145 F. 2d 643, 644-5 (CA 10, 1944) cert. den. 323 U. S. 803. "And a statute which . . . leaves the sentencing court in doubt as to the punishment it may impose for the described offense, is void and inoperative." *Smith* v. *United States*, 145 F. 2d at 645.

This fundamental principle was unanimously applied by this Court in *United States* v. *Evans*, 333 U. S. 483. There the defendant was charged with concealing and harboring aliens in violation of Section 8 of the Immigration Act of 1917. Confusion existed as to the penalties applicable to the offenses charged in the indictment. The District Court granted a motion to dismiss the indictment and the Government appealed directly to this Court. Justice Rutledge, writing for a unanimous court, stated the problem of the case as follows:

> "The case presents an unusual and a difficult problem in statutory construction. It concerns not so much Congress' intention to make concealing or harboring criminal as it does the penalty to be applied to those offenses . . . The choice, as might appear on glancing at the statute, is not simply between no penalty, at the one extreme, and, at the other, fine plus imprisonment up to the specified maxima for each alien concealed or harbored. The problem is rather one of multiple choice, presenting . . . inconsistent answers on the statute's wording." 333 U. S. at 484-5.

The opinion then sets out the alternative contentions:

> "the Government rests primarily on the clarity with which § 8 indicates Congress' purpose to make concealing or harboring criminal, rather than upon any like indication of legislative intent concerning the penalty. Because the purpose to proscribe the conduct is clear, it is said, we should not allow that purpose to fail because of ambiguity concerning the penalty." 333 U. S. at 485.
>
> "Appellee . . . denies that it is possible, either from the section's wording or from the legislative history, to ascertain with any fair degree of as-

> surance which one of the possible penal consequences Congress may have had in mind. From this he falls back upon the conclusion . . . that the task of resolving the difficulty goes beyond dispelling ambiguity in the usual sense of judicially construing statutes and, if attempted, would require this Court to invade the legislative function and, in effect, fix the penalty. The argument is therefore not merely that a rule of strict construction should be applied in petitioner's favor. It is rather that the choice the Government asks us to make is so broad and so deep, resting among such equally tenable though inconsistent possibilities, that we have no business to make it at all." 333 U. S. at 485-6.

The Court noted the extreme nature of the appellee's argument, remarking: "where Congress has exhibited clearly the purpose to proscribe conduct * * * and has not altogether omitted provision for penalty, every reasonable presumption attaches to the proscription to require the courts to make it effective in accord with the evident purpose." (333 U. S. at 486). But the Court also observed:

> "But strong as the presumption of validity may be, there are limits beyond which we cannot go in finding what Congress has not put into so many words or in making certain what it has left undefined or too vague for reasonable assurance of its meaning. In our system, so far at least as concerns the federal powers, defining crimes and fixing penalties are legislative, not judicial, functions. But given some legislative edict, the margin between the necessary and proper judicial function of construing statutes and that of filling gaps so large that doing so becomes essentially legislative, is necessarily one of degree." 333 U. S. at 486-7.

After discussing the alternative punishments, this Court concluded:

> "If there were less inconsistency among the tentative possibilities put forward or greater consistency with the section's wording implicit in one, resolution of the difficulty by judicial action would involve a less wide departure from the common function of judicial interpretation of statutes than is actually required by this case. But here the task is too large. With both of the parties we agree that Congress meant to make criminal and to punish acts of concealing or harboring. But we do not know, we can only guess with too large a degree of uncertainty, which one of the several possible constructions Congress thought to apply . . .
>
> "This is a task outside the bounds of judicial interpretation. It is better for Congress, and more in accord with its functions, to revise the statute than for us to guess at the revision it would make. That task it can do with precision. We could do no more than make speculation law." 333 U. S. at 495.

The rule enunciated and applied by this Court in the *Evans* case appears applicable to the situation posed by this case.[6] As in *Evans*, more than one penalty can be imposed here and it is not possible "either from the [statute's] wording or from the legislative history, to ascertain with any fair degree of assurance which one of the penal consequences Congress may have had in mind." Thus, one solution to the problem posed in this case might be to apply the reasoning in *Evans*.

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[6] For state court decisions applying this principle, see cases cited in Petitioner's Brief on the merits in No. 666, *Castillo v. United States*, at p. 11; and in Part I, Argument, in Petitioner's Brief on the merits in Nos. 430 and 834.

and hold any conviction for income tax evasion based upon the filing of false and fraudulent returns under 145(b) or 3616(a) to be void, in view of the fatal ambiguity relating to penalty inherent in these statutes.

IV

If the Court concludes that the ambiguity relating to the penalty for the crime of filing false and fraudulent returns with intent to defeat or evade tax is not so fatal as to make convictions under 145(b) or 3616(a) void, then there is a second alternative: To require the imposition of the less harsh of the two penalties, in any case in which the two provisions apply.

The rule that only the less harsh of two applicable penalties can be imposed is no more than an application of the well accepted principle that where there is ambiguity in the construction of penal statutes, doubts will be resolved in favor of the accused. Only recently, this Court applied this principle in *Bell v. United States*, 349 U. S. 81, where the issue was whether the Mann Act made the simultaneous transportation of more than one woman liable to cumulative punishment for each woman so transported. The Court, in that case observed:

> "Congress could no doubt make the simultaneous transportation of more than one woman in violation of the Mann Act liable to cumulative punishment for each woman so transported. The question is: did it do so?" 349 U. S. at 82-83.

In answering the question so posed, this Court's observations in *Bell* appear singularly relevant to the question presented in these proceedings.

> "[Congress] has not done so in words in the provisions defining the crime and fixing the pun-

ishment. Nor is guiding light afforded by the statute in its entirety or by any controlling gloss.

* * *

"It is not to be denied that argumentative skill * * * could persuasively and not unreasonably reach either of the conflicting constructions. About only one aspect of the problem can one be dogmatic. When Congress has the will it has no difficulty in expressing it * * *. *When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity.*" 349 U. S. at 83 (emphasis supplied.)

The philosophy underlying the principle was also pungently described:

"And this is not out of any sentimental consideration, or for want of sympathy with the purpose of Congress in proscribing evil or antisocial conduct. *It may fairly be said to be a presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment.*" *Ibid.* (Emphasis supplied.)

The *Bell* case states in clear terms what this Court has often said before, and in other contexts. See, *e.g. United States v. Universal C. I. T. Credit Corp.*, 344 U. S. 218, 221-2; *Prince v. United States*, 77 S. Ct. 403, 407 (No. 132, O. T. 1956); *Fong Haw Tan v. Phelan*, 333 U. S. 6, 10; see also *Wallis v. Tecchio*, 65 F. 2d 250, 252 (CA 5, 1933). And the rule is so well established that it was accepted in the *Evans* case as a basic axiom:

"The argument is therefore *not merely that a rule of strict construction should be applied in petitioner's favor.* It is rather that the choice the Government asks us to make is so broad and so deep . . . that we have no business to make it at all." 333 U. S. at 486. (Emphasis supplied.)

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the sentence imposed upon the Petitioner is illegal and void and should therefore be vacated and set aside; or, at the least, that the sentence imposed under Section 145(b) as a felony, be corrected as one under Section 3616(a), as a misdemeanor.

Respectfully submitted,

PEYTON FORD
ALAN Y. COLE
Attorneys for Amicus Curiae

Of Counsel:

FORD AND LARSON
Washington, D. C.

JAMES C. HERNDON
Akron, Ohio

EDMUND D. DOYLE
Columbus, Ohio

APPENDIX A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Cr. No. 20632

UNITED STATES OF AMERICA

v.

PONCET DAVIS.

McNamee, District Judge.

The brief of the Government in opposition to defendant's motion to correct sentence refutes effectively and completely the arguments advanced in support of the motion and demonstrates convincingly that the sentence imposed was in all respects legal. For these reasons I adopt the Government's brief in toto and incorporate it in this opinion. I would add only the following: It is a firmly established rule of statutory construction that where an Act contains special provisions, they are to be considered as exceptions to a general provision in a separate earlier or later enactment. 59 *Am. Jur.* Sec. 367, p. 371; id. Sec. 561, p. 562. The general principle is stated in 82 *C.J.S.* Sec. 369, p. 843, thus:

> "It is a fundamental rule that where a general statute, if standing alone, would include the same matter as the special act, and thus conflict with it, the special act will be considered as an exception to, or qualification of, the general statute, whether it was passed before or after such general enactment."

Section 3616(a) is a general statute embracing many types of false documents and relating to all classes of taxes. Section 145(b) defines as a felony a willful attempt "in any manner to evade or defeat any tax imposed *by this Chapter*," etc. (Emph. sup.) Section 145(b) is in the chapter that deals specifically and solely with Income

Tax and should be considered and treated as an exception to Sec. 3616(b). See *Robinson* v. *United States*, 142 F. (2d) 431, and cases therein cited. Compare *United States* v. *Fiplitz*, 105 F. Supp. 512. I am not unmindful of the apparent conflict of the above with *United States* v. *Gilliland*, 312 U.S. 86; but in view of the legislative history of Section 145(b) I am of the opinion that the principle hereinabove referred to is applicable.

The motion is overruled.

/s/ CHARLES J. McNAMEE
United States District Judge

Sept. 27, 1956

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 13,042

PONCET DAVIS, *Appellant*

v.

UNITED STATES OF AMERICA, *Appellee*

Order

Upon motion of counsel for the Appellee and for good cause shown, the Appellee is hereby granted an extension of time until sixty (60) days after the issuance of the decision and opinion of the Supreme Court of the United States in case No. 666 on the Docket of said Court, entitled *Frank Costello* v. *United States*, to file its brief and appendix in this case.

/s/ POTTER STEWART, J.
Court of Appeals
Sixth Circuit

Filed February 12, 1957